

Supreme Court, U. S.
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IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. **75-6451**

MICHAEL WAYNE GREEN,

Petitioner,

- v -

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA.

DONALD ANDERSON
Office of the Public Defender
Oklahoma County Courthouse
Oklahoma City, Oklahoma 73102

JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
DAVID E. KENDALL
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

CITATIONS TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 542 P.2d 551 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1a - 5a, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on November 25, 1975. On February 17, 1976, Mr. Justice White extended the time within which a petition for certiorari might be filed until March 24, 1976.

QUESTIONS PRESENTED

1. Does the post facto invalidation of a statutory provision empowering an appellate court to conduct an evidentiary hearing and thereafter to reduce the death penalty imposed for the crime of first degree murder violate Article I, Section 10 of the Constitution or the Fourteenth Amendment, where the effect of such an invalidation is to subject a criminal defendant to an irreducible death sentence that was not authorized by law at the time of his offense?
2. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and the Ex Post Facto Clause of Article I, Section 10 of the Constitution of the United States.
2. This case also involves the following provisions of Oklahoma law:

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21. Okla. Stat. Ann. §701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively

in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. §701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. §701.6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at hard labor."

STATEMENT

Petitioner was convicted by a jury in the District Court of Oklahoma County of the murder of a police officer engaged in the performance of his official duties.

The principal witness for the state was John Charles Campbell, an Oklahoma City policeman, who had been the partner of the murder victim, James Chamblin (T.210), and was on duty with him at the time of the crime (T.268). The two officers had entered the Tip Toe Inn shortly after three o'clock (T.306) on the morning of April 16 (T.288) "to check the premises for violations" (T.269). Only the sale of beverages "less than 3.2 beer" was allowed at the Tip Toe Inn (T.278), and the sale of beer was prohibited after midnight (T.307). As the officers walked in they "observed the people at the bar and what they were drinking which was nothing unusual." (T.271.) Officer Campbell did not see any beer. (T.307.) The smell of alcohol and the sound of "loud talking" attracted them to a table (T.271-272) at which ^{1/} petitioner was seated with another man and two women (T.272). Both officers were in uniform. (T.274.) The witness asked petitioner what he was drinking; petitioner began to stand and said "'Officer, all I am drinking is grapefruit juice.'" (T.275.) Petitioner handed the witness his cup in which the witness smelled an "intoxicating beverage." (Id.) The witness also smelled alcohol on petitioner's breath and noticed that he was unsteady on his feet. (Id.) At the witness' request (T.275) petitioner produced "out of state" identification bearing the name "Danny Terry" (T.276.). At this point, one of the women

^{1/} These three people were not called to testify and were identified only as "indian male" and "indian" female. (T.235, 309).

at the table left. (T.277.) The remaining three were told to stand and petitioner was told that he was under arrest for "public drunk" and drinking in public. (T.277-278.) Officer Campbell said that petitioner "seemed . . . unsure or nervous . . . and he kept asking me questions why he was being arrested. As I explained to him he didn't understand nothing I was saying."

(T.278.) The three were told to go outside and did so, with petitioner in the lead. (Id.) As they approached the police officers' car, petitioner again asked why he was being arrested; he was told, and told that he could post a thirty-five dollar bond.

(T.280.) Petitioner turned and started to walk toward the car, pulled a pistol, turned and shot each of the officers. (T.280-81.) Officer Chamblin, who had fallen where he stood, but was "trying to move", was shot by petitioner a second time at close range.

(T. 284-85.) Officer Campbell tried to jump behind the car and a third shot hit him in the back (T.287.) There followed an exchange of fire during which petitioner was hit several times.

(T.289-93.) The witness saw petitioner flee on foot. (T.293.) Shortly thereafter he described petitioner to an Officer Hoklotubbe as "either white or indian male" "wearing a dark colored pants with a beige or tan colored jacket" who was "about five feet six to eight, maybe 170 ... 190 pounds." (T.329.)

Officer Hoklotubbe testified that after receiving this description he searched the area and found petitioner behind a fence; he had been shot several times and there was a gun (identified as State's Exhibit 15) on the ground three or four feet from the spot on which petitioner lay. (T.335-36.) Officer Hoklotubbe took petitioner to a hospital. (T.340.)

Fred B. Jordan, a medical examiner, testified that Officer Chamblin had been shot in the left abdomen and right

groin. (T.299.) He identified the wound to the abdomen, which had been caused by a bullet traveling a downward path, as the cause of death. (T.303.)

The defense did not present evidence.

The trial judge determined that instructions as to both murder in the first degree and manslaughter in the first degree were warranted for the following reasons:

"Under the new murder statute of the State of Oklahoma pursuant to Furman versus Georgia, Supreme Court of the United States decision. The Jury cannot arbitrarily be given a choice of a lesser included offense unless the evidence adduced at the Trial warrants it, and pursuant to the statute I am at this time going to dictate into the record my reasons for giving an instruction on the lesser included offense of manslaughter in the first degree.

"Under the statutes of murder one, one of the essential elements of murder one is that killing must be done with a premeditated design to effect the death of the person killed. There was evidence adduced at the Trial that the Defendant was intoxicated at the time of the alleged offense. There was further evidence adduced at the Trial that the Defendant did not comprehend the reasons for him being arrested at this time.

"Voluntary intoxication under the laws of this State is no defense to murder in the first degree nor does it mitigate a punishment or excuse the crime, but the law of this State provides that involuntary intoxication it can be considered by the Jury as to whether or not the Defendant was capable of forming a premeditated design to effect the death of the person, and if that voluntary intoxication was to the degree and to the extent that the Defendant was incapable of forming a premeditated design to effect death, the Jury may take that into consideration on that point. And of course, if the Jury would find that the Defendant was so intoxicated, he would find that he didn't have a premeditated design to effect death, then one of the essential elements of murder in the first degree would not be present.

"There is no facts adduced at this Trial that will reduce the charge to murder in the second degree because nothing of the facts of this case falls within the statutory definition of murder in the second degree.

"There is some evidence along this line, that he is intoxicated. Now, the extent, the degree of intoxication is a question of fact not a question

of law. I mean a question of fact for the Jury to determine not the Court. It is for these reasons that I will leave it up to the Jury as to whether or not that intoxication was to the extent that the defendant was incapable of forming premeditated design to effect death."

(T. 361-62.)

The jury, each member of which had answered affirmatively the question "in a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?" (see, e.g., T. 21-2), ^{2/} took one hour to find petitioner guilty of murder in the first degree (T. 390, 392).

On November 18, 1974, the court sentenced petitioner to be "put to death by . . . electricution [sic] as provided by law." (T. 396.)

2/ Of the twelve prospective jurors who answered this question in the negative, eleven were excused for cause on the basis of their answers to the subsequent question "Are your reservations about the death penalty such that regardless of the law, the facts and circumstances of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree?" (T. 23, 26, 29-30, 40, 143, 163, 165, 171, 178, 182, 191.) The twelfth was excused on a peremptory challenge by the state. (T. 115.)

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

In his Petition in Error to the Oklahoma Court of Criminal Appeals, petitioner raised, as point 6, the federal constitutionality of the imposition of the death penalty. Point I of the Brief of Appellant below argued that petitioner's death sentence was unconstitutional. This argument was explicitly rejected by the Court of Criminal Appeals, Green v. State, supra, 542 P.2d at 553.

On rehearing, petitioner argued that imposition of the penalty of death in his case would, in view of the decision of the Court of Criminal Appeals severing provisions for imposition of an alternate sentence after a hearing on appeal, violate the ex post facto provisions of the Constitution of the United States. That contention was rejected, for the reasons set forth in Williams v. State, 542 P.2d 554, 596-7 (Okla. Cr. App. 1975), and the decision upholding petitioners death sentence was reaffirmed, Green v. State, supra, 542 P.2d at 554.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1973); Fessmire v. Oklahoma, 408 U.S. 935 (1972); Menthen v. Oklahoma, 408 U.S. 940 (1972).^{3/}

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder. ^{4/} 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

^{3/} See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

^{4/} Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."^{5/} In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."^{6/} The statute authorizes capital juries to be instructed "regarding

5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."^{7/} Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"^{8/} §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining *inter alia* "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."^{9/}

7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.). Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.P.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to ". . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Dickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, ____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. 197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, ____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, ____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 41, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

"We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S. Supp. 1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okl. Cr. App. 1975), the court further declared that:

10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okl. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okl. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okl. Cr. App. 1975); Lusty v. State, 452 P.2d (Okl. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okl. Cr. App. 1975); Jones v. State, 452 P.2d 1316 (Okl. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Penman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 520 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24, 29 - 36 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration of capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EX POST FACTO INVALIDATION OF A STATUTORY PROVISION IMPONENTING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmation of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

"the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrong-doer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence.^{11/} The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

^{11/} Under the old law governing grand larceny, the sentencing court was required to fix a minimum term of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

"It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change."

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301 U.S., at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . 'in relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage]" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

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"Removal of the possibility of a sentence of less than fifteen years . . . operates to . . . [petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 552 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583, and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).^{13/} The Court should grant certiorari to determine

^{13/} "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information. ^{14/} In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 P. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Bent v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, ^{15/} 65 Okla. Cr. 99, 83 P.2d 210 (1938).

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court,
^{16/} 473 P.2d 312 (Okla. Cr. App. 1970).

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

"it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Sowards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Pinfield v. State, 44 Okla. Cr. 232, 280 P.630, 632 (1929) ("[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain"). with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprobation for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree ^{17/} as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

"In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

^{17/} The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague ^{18/} and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter ^{19/} his original choice.

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation ^{20/} and is "used quite extensively in Oklahoma," ^{21/} is also predominantly a matter of prosecutorial discretion. Although court approval is required

18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28, 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,^{22/} the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra,^{23/} 536 P.2d 965, 971^{24/} (1975). The Young opinion leaves unclear whether the State is required to convince the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

22/ State ex rel. Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App. No. 0-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court, No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRP-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.

William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRP-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.

Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRP-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Harwell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime, ^{25/} "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses" ^{26/} and the philosophy and attitudes of the local ^{27/ 28/} prosecutor.

^{25/} Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1960).

^{26/} Id. at 84.

^{27/} Id. at 83:

"One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

^{28/} In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

"find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." ^{29/}

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, ^{30/} under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4, 11-12 supra), which forbids the submission of evidentially unsupported lessers, Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

29/ Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

"Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

30/

"[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and ^{31/} Young cases previously discussed -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Forman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

"From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

31/ See pp. 23-28 supra.

32/

defendants for first degree murder, but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp. 2-3 supra, neither robbery-murder nor murder in any of the ten enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946); that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899); that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Cinq v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirley v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDODOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no juror hearing it for the first time can fairly be expected to understand it," ibid.; ^{35/} and it therefore represents

35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1) (1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

"Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

35/ cont'd.

"Premeditation [...] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

"'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943) (quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life." Walker v. State, 91 Okla. Cr. 1, 214 P.2d. 961, 963 (1950). This mental purpose is "'formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act.'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974) (defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

36/

"refractory to the best-instructed human understanding" that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the ^{37/} guise of resolving issues of evidential doubt."

"[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless."^{38/}

And if "[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose," Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired
^{39/} conclusion" where the stakes are life or death and where
the enormity of those stakes is forcibly brought home to the
jurors by the requirement that they "state affirmatively in
their [first degree murder] verdict that the defendant shall
^{41/} suffer death."

^{39/} BLACK, op. cit. supra note 38, at 46.

^{40/} The resort by juries even to verdicts of acquittal as a
means of avoiding capital convictions" in cases which were
'willful, deliberate, and premeditated' in any view of that
phrase, but which nevertheless were clearly inappropriate for
the death penalty" is an historical commonplace. McCaughan v.
California, 402 U.S. 183, 199 (1971). See the authorities
collected in the Brief for Petitioner, Fowler v. North Carolina,
No. 73-7031, at pp. 90-92 n.122.

^{41/} Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p.
supra. The Court of Criminal Appeals has indicated that the
omission of such a statement would not have the legal effect of
sparing the defendant's life, Williams v. State, supra, 542
P.2d at 578-79, but the requirement serves nonetheless to
assure that the jury is aware of the life-or-death consequences
of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "An abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon"Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present Petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

*

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

"[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."^{42/}

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Clegg, Roberts, Woodson-Nestor and Durek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Durek (No. 75-5394).

^{42/} White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,


DONALD ANDERSON
Office of the Public Defender
Oklahoma County Courthouse
Oklahoma City, Oklahoma 73102

JACK GREENBERG
JAMES NAMRIT, III
PEGGY C. DAVIS
DAVID E. KENDALL
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

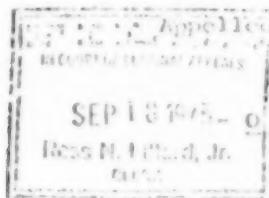
MICHAEL WAYNE GREEN,
Appellant,

-vs-

THE STATE OF OKLAHOMA,

FOR PUBLICATION

No. F-75-279



BUSSEY, Judge:

Appellant, Michael Wayne Green, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Oklahoma County, Case No. CRP-74-1352, for the offense of First Degree Murder, in violation of 21 O.S.Supp. 1974, § 701.1, ¶1. In accordance with the provisions of 21 O.S.Supp. 1974, § 701.3, the defendant was thereafter sentenced to suffer death, and from said judgment and sentence a timely appeal has been perfected to this Court.

At the trial L. G. Purser, Chief of Police for the Oklahoma City Police Department, first testified for the State that James Chamblin became employed with that department as a Police Officer on June 1, 1973, and was so employed on April 16, 1974.

Officer Gary James, assigned to the Crime Lab of the Oklahoma City Police Department, then testified that at approximately 3:35 a.m. on April 16, 1974, he arrived at the Tip Toe Inn in Oklahoma County, Oklahoma, where he assisted in processing that scene. Exhibit 1 was identified as a rough drawing of that location as he then observed the same, and Exhibits 2 through 9 and 14 were identified as various photographs thereof. Exhibit 15 was identified as a gun found in a nearby alleyway close to a pool of blood which trailed from the parking lot in front of the Tip Toe Inn. The gun contained one live round and five spent cartridges when found. Also, the gun was processed for fingerprints, but no identifiable latent prints could be obtained. Exhibits 10 through 13 were identified as pictures of the body of the victim after removal from that location. Exhibits 1 through 13 were admitted



into evidence.

Master Patrolman John Charles Campbell, of the Oklahoma City Police Department, next testified that on April 16, 1974, he was on duty with his partner, Officer James Charblin, their shift being from 11:30 p.m. the previous night to 7:30 a.m. that morning. While on routine patrol the uniformed police officers proceeded to the Tip Top Inn at about 3:10 a.m. When inside Officer Campbell heard loud talking at a particular booth where he found two males and two females seated and detected a strong odor of liquor. When Officer Campbell asked the defendant what he was drinking, the defendant began to stand up and replied that he was drinking grapefruit juice. The defendant then offered the cup to Officer Campbell who detected that the cup contained the odor of an alcoholic beverage. Officer Campbell observed the defendant to be intoxicated and asked him for identification. The out-of-state identification produced by the defendant was that of a Danny Terry. During this conversation, one of the females left. The defendant was placed under arrest for committing two separate offenses, public drunk and drinking in a public place. The defendant bid the way to the front door, accompanied by the other male and female, in addition to the two officers. During this time the defendant inquired as to why he was being arrested, but when advised appeared not to understand. Once outside the premises, the defendant again inquired as to why he was being arrested. Officer Campbell again explained the reasons and advised him of the procedure upon arrest including the fact that a \$35.00 bond could be posted. The defendant then turned away from the officers and started walking toward the police car. The defendant then suddenly produced a pistol from under the left side of his jacket, and in rapid succession first shot Officer Charblin and then shot Officer Campbell. Officer Campbell had started to jump behind a car when he first observed the defendant making a sudden movement and the bullet struck him in the leg while he was somewhat on top of the car. At this time Officer Charblin was lying flat on his back trying to move and the defendant quickly shot him a second time while standing directly over him. The defendant then immediately shot Officer Campbell again, striking him in the back and forcing him to fall on the opposite side of the car.

While lying on the ground, Officer Campbell could see under the car that the defendant was coming around toward him. As the defendant came around the car, Officer Campbell withdrew his service revolver and both he and the defendant shot at about the same time. Officer Campbell fired three consecutive times, while the defendant fired once and fell back behind the car. Officer Campbell then managed to pull himself up on the car, and as the defendant fled four additional shots were exchanged. Three of these shots were fired by Officer Campbell and struck the defendant at least twice. The defendant was positively identified as the man who had shot the officers in resisting arrest.

Frederick Briggs Jordan, a physician and forensic pathologist with the Office of the Chief Medical Examiner for the State of Oklahoma, testified that he performed an autopsy on the body of James Dewey Chamblin on April 16, 1974. He discovered two bullet wounds, one entering the right groin and the other the left abdomen. Death resulted from extensive bleeding into the body cavities when the latter bullet penetrated the intestines, the aorta, the vertebral column, the spinal cord and then exited the body. Exhibits 10 through 13 were identified as photographs of the deceased and depicted his injuries. Exhibit 16 was identified as containing the projectile which had entered the right groin and remained within the body of the victim.

Officer Eddy Gene Hoklotah, of the Oklahoma City Police Department, then testified that upon a report of a police officer having been shot, he was dispatched to the Tip Toe Inn in the early morning hours of April 16, 1974. Upon arrival he observed Officer Campbell leaning against a car and Officer Chamblin lying on the ground. A search ensued for a man described by Officer Campbell and a man matching the description was soon found lying in a nearby alleyway. The man had been shot numerous times and a .38 caliber Colt pistol was discovered near him but left undisturbed. The defendant was identified as the man found in the alleyway. Exhibits 14 and 15 were then admitted into evidence.

The State then rested and no evidence was introduced in behalf of the defendant.

In his sole assignment of error, the defendant contends that the death sentence is unconstitutional by virtue of the decision

of the United States Supreme Court in the consolidated cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 32 L.Ed.2d 346 (1972). However, we need only observe that this contention recently was thoroughly analyzed and rejected by this Court in the consolidated opinion of Williams and Jettus v. State, Okl.Cr. P.2d , P-74-648 and P-74-650 (1975). In connection with this proposition the defendant offers no argument or authority not presented or considered upon rendition of that decision. We therein held in part as follows:

"[T]he scheme for enforcement of capital punishment within this State under the provisions of 21 O.S.Supp. 1974, § 701.1, et seq., as construed, does not constitute cruel and unusual punishment and is not violative of the Eighth and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court in Furman."

The evidentiary hearing contemplated under the provisions of 21 O.S.Supp. 1974, §§ 701.5 and 701.6, was previously assigned and heard by this Court. No evidence was offered by either the defendant or the State upon that hearing. Rather, shortly prior thereto the defendant filed a motion requesting that this Court establish guidelines for the review of death sentences under those statutory provisions. As we have since held in our decision in Williams and Jettus, supra, that these provisions are unconstitutional, no further discussion thereof is necessary here.

Pursuant to Rule 1.11, 22 O.S.Supp. 1974, Ch. 18, App., this case was previously assigned and heard for oral argument. We have carefully reviewed the entire record before this Court, and thoroughly considered the argument and authority presented and have determined that the record is free of any error of law requiring reversal. The judgment and sentence is, accordingly, AFFIRMED.

Pursuant to Rule 1.18, 22 O.S.Supp. 1974, Ch. 18, App., the defendant is advised that any petition for rehearing herein must be filed with the Clerk of this Court within fifteen (15) days of the date upon which this opinion is filed therein.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE JOE CANNON, JUDGE,

MICHAEL WAYNE GREEN, appellant, was convicted of the offense of First-Degree Murder; was sentenced to Death, and appeals. Judgment and sentence AFFIRMED.

DON ANDERSON, PUBLIC DEFENDER,
OKLAHOMA COUNTY, OKLAHOMA,
Attorney for Appellant.

LARRY BURKHARDT, ATTY., CRIM.,
BILL BRUCE, ASST. ATTY., CRIM.,
Attorneys for Appellee.

OPINION BY BUDDEY, J.
EDGERTON, P. J., CONCURS
BLISS, J., CONCURS

APPENDIX B

PERSONS UNDER SENTENCE OF DEATH
IN THE STATE OF OKLAHOMA

Bobby Joe Williams (white) - sentenced March 29, 1974
Oklahoma County District Court, No. CRF-73-3181

Allen Clayburn Justus (white) - sentenced April 30, 1974
Oklahoma County District Court, No. CRF-73-3181

Ben Wiley Jones (black) - sentenced May 10, 1974
Oklahoma County District Court, No. CRF-73-2221

William Dale Davis (white) - sentenced June 28, 1974
Oklahoma County District Court, No. CRF-74-1175

Roger Dallas Rowbotham (white) - sentenced July 14, 1974
Rogers County District Court, No. CRF-74-43

Leroy Thomas (black) - sentenced September 23, 1974
Comanche County District Court, No. CRF-74-136

Michael Wayne Green (white) - sentenced November 18, 1974
Oklahoma County District Court, No. CRF-74-1352

Fredrick Wishon (white) - sentenced January 6, 1975
Oklahoma County District Court, No. CRF-74-912

Richmond Sanders (black) - sentenced January 23, 1975
Oklahoma County District Court, No. CRF-74-3170

Michael Selsor (white) - sentenced January 30, 1975
Tulsa County District Court, No. CRF-74-2181.

Darrell Andrews (white) - sentenced February 6, 1975
Okmulgee County District Court, No. CRF-74-43; 44

Calvin Barnett (black) - sentenced February 6, 1975
Tulsa County District Court, No. CRF-74-187

Bobby Wayne Collins (white) - sentenced February 20, 1975
Garfield County District Court, No. CRF-75-28

William Provo (black) - sentenced April 24, 1975
Oklahoma County District Court, No. CRF-75-130

Oran Larue (black) - sentenced May 9, 1975
Oklahoma County District Court, No. CRF-74-2409

Billie Miller (white) - sentenced June 16, 1975
Oklahoma County District Court, No. CRF-75-768

Janet Miller (white female) - sentenced June 16, 1975
Oklahoma County District Court, No. CRF-75-768

Thomas Andrew Bias (white) - sentenced June 27, 1975
Creek County District Court, No. CRF-74-123

Don Roberts (black) - sentenced July 24, 1975
Oklahoma County District Court, No. CRF-75-551

Glenn Ray Simmons (black) - sentenced July 24, 1975
Oklahoma County District Court, No. CRF-75-551

William Y. Hammons (black) - sentenced August 28, 1975
McAlester County District Court, No. CRF-75-116

Leroy Daniels (black) - sentenced August 29, 1975
McCurtain County District Court, No. CRF-75-18

Jeff Henson (white) - sentenced September 5, 1975
Muscogee County District Court, No. CRF-74-355

Richard Riley Morris (native american) - sentenced September 16, 1975
Sequoia County District Court, No. CRF-75-55

Michael Wayne Brown (white) - sentenced October 10, 1975
Tulsa County District Court, No. CRF-75-1297

Joney Joe Lusty (native american) - sentenced October 18, 1975
Oklahoma County District Court, No. CRF-74-1175

Leonard Patterson (black) - sentenced October 24, 1975
Oklahoma County District Court, No. CRF-75-526

Rickie Robinson (white) - sentenced November 17, 1975
Custer County District Court, No. CRF-75-95

Lonnie Graves (black) - sentenced December 2, 1975
McCurtain County District Court, No. CRF-75-18

Alfred X. Brooks (black) - sentenced February 4, 1976
Oklahoma County District Court, No. CRF-74-4415

Carlos Phelps (white) - sentenced February 10, 1976
Kay County District Court, No. CRF-75-198

APR 28 1976

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6451

MICHAEL WAYNE GREEN,
Petitioner,

-vs-

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

MARVIN C. EMERSON
FIRST ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, Oklahoma 73105

COUNSEL FOR RESPONDENT

Of Counsel:

Bill J. Bruce
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

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Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974) -----	7
Provo v. State, Okl. Cr., <u>P.2d</u> , appellate No. F-75-301, issued April 20, 1976 -----	7

Statutes Cited

21 O.S. Supp. 1974, §§701.5, 701.6 -----	1, 2, 3
21 O.S. Supp. 1974, §701.3 -----	3, 6
22 O.S. 1971, §264 -----	5

Articles of Constitution Cited

Article I, §10, United States Constitution -----	1, 2
Article VI, §10, Oklahoma Constitution -----	7

Other Authorities Cited

Ex Post Facto in the Constitution, 20 Michigan Law Review 315 (1921) -----	4
The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 University of Chicago Law Review 539 (1947) -----	4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

MICHAEL WAYNE GREEN,)
Petitioner,)
-vs-) No. 75-6451
THE STATE OF OKLAHOMA,)
Respondent.)

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Michael Wayne Green, hereinafter referred to as petitioner, was convicted of Murder in the First Degree. His sentence of death was affirmed on appeal to the Oklahoma Court of Criminal Appeals, reported below as Green v. State, Okl. Cr., 542 P.2d 551 (1975).

Mandate was stayed below pending resolution of related issues raised in the Petition for Rehearing in Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975) and oral argument was presented upon consolidated hearing. Thereafter, petitioner's judgment and sentence was reaffirmed for reasons stated in the Opinion on Rehearing in the leading case, Williams and Justus v. State, *supra*, at page 591.

REASONS FOR NOT GRANTING WRIT

Invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6 by Oklahoma Court of Criminal Appeals raises no constitutional issue where, as here, petitioner is not within the class addressed by stricken statutes. Invalidation thereof is not within the *ex post facto* proscription of Article I, §10 of the United States Constitution, nor deprives petitioner of any constitutional right.

Oklahoma's mandatory scheme of capital punishment does not permit infliction of the death penalty *contra to Furman v. Georgia*, 408 U.S. 238 (1972), nor is death sentence imposed otherwise cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendment of the United States Constitution.

ARGUMENT AND AUTHORITIES

I.

INVALIDATION OF 21 O.S. SUPP. 1974, §§701.5, 701.6 BY OKLAHOMA COURT OF CRIMINAL APPEALS RAISES NO CONSTITUTIONAL ISSUE WHERE, AS HERE, PETITIONER IS NOT WITHIN THE CLASS ADDRESSED BY STRICKEN STATUTES; INVALIDATION THEREOF IS NOT WITHIN CONSTITUTIONAL EX POST FACTO PROSCRIPTION OF ARTICLE I, §10 OF THE UNITED STATES CONSTITUTION, NOR OTHERWISE DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT.

Petitioner's contention is based upon the invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6¹, which he claims² deprived him of the opportunity for an evidentiary hearing contemplated therein, thereby negating the possibility of a reduced sentence.

As stated in Section 701.5, the purpose of the evidentiary hearing was to determine if the sentence of death comports with the principles of due process and equal protection of the law. The evidentiary hearing contemplated therein was duplicitous, as recognized by the State Appellate Court.³

Petitioner has never contended that his sentence was a result of any factor listed within the stricken statutes, although expressly invited to do so during oral argument

1. Quoted verbatim, petitioner's brief, page 4.

2. Petitioner's brief, page 14.

3. *Opinion on Rehearing, Williams and Justus v. State, Okl. Cr., 542 P.2d 211, at page 594.*

below.⁴ Certainly, any factor or evidence regarding such constitutional protections as due process and equal protection could have been presented to the trial court and reviewed on appeal, notwithstanding the stricken statutes. At this late date, petitioner has yet to make such claim, presumably because he is not among the class of persons within the purported ambit of the stricken provisions.⁵

Petitioner's claim that the instant case is squarely controlled by a prior decision of this Court,⁶ misconstrues the holding therein. In the cited case, the penalty for Grand Larceny at the time of the offense was "for not more than 15 years." The Legislature changed the law after the commission of the crime, but before sentencing, making the 15 year sentence mandatory. This Court held the new law was *ex post facto* because the legislative change occurred after the crime was committed.

In the instant case, the mandatory penalty of death under 21 O.S. Supp. 1974, §701.3 was in effect at the time of the offense and during the time the petitioner was charged, tried, convicted and sentenced to death. Subsequently, the State appellate court held the provisions of 21 O.S. Supp. 1974, §§701.5, 701.6 unconstitutional. Those provisions purportedly authorized the appellate court to modify the death sentence only if such death sentence was found to have been a result of specified factors therein which resulted in denial of due process or equal protection of the law.

Petitioner has made no claim at any time, during trial, on appeal, or in his petition for certiorari, that his death

4. 542 P.2d at page 553.

5. In Williams and Justus v. State, Okl. Cr., 542 P.2d at page 597, the State court specifically found that appellants there were not within the class of persons contemplated within the stricken statutes.

6. Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), petitioner's brief, page 18.

sentence was affected by any factor within the stricken provisions.

This Court has never held that the purpose of the ex post facto clause was to serve as a restraint upon the judiciary, but has, in fact, held contra in Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); Frank v. Manquum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and, United States v. Rundle, 383 F.2d 421 (3rd Cir. 1967), cert. denied, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131. The provision was intended to secure substantial personal rights against arbitrary and oppressive legislation. See Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915). Respondent is fortified in this position by the history of the ex post facto clause. See, e.g., Ex Post Facto in the Constitution, 20 Michigan Law Review 315 (1921) and The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 University of Chicago Law Review 539 (1947).

Although the due process clause is admittedly a brother to the ex post facto provision, there exists a danger in treating them alike. See separate opinion by Justices Harlan and Frankfurter in James v. United States, 366 U.S. 213, 247, 6 L.Ed.2d 246, 269, 81 S.Ct. 1052 (1961). In Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), this Court considered ex post facto rationale in deciding a due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process because they had no notice that their actions constituted a criminal offense at the time of their acts. This decision is nowhere analogous to the instant case. Other cases cited by petitioner are likewise distinguishable.

II.

OKLAHOMA'S SCHEME OF MANDATORY CAPITAL PUNISHMFNT DOES NOT PERMIT INFILCTION OF THE DEATH PENALTY CONTR. TO FURMAN V. GEORGIA, 408 U.S. 228 (1972). NOR IS THE

DEATH SENTENCE IMPOSED UPON PETITIONER
OTHERWISE CRUEL AND UNUSUAL PUNISHMENT
WITHIN THE MEANING OF THE EIGHTH AND
FOURTEENTH AMENDMENTS OF THE UNITED
STATES CONSTITUTION.

Generally, petitioner cites a number of cases antedating current capital punishment statutes with the inference that the former affects the latter. However, Oklahoma's procedure was significantly changed by the enactment of current capital punishment legislation and respondent submits that no State in the Union has exceeded Oklahoma in curbing arbitrary discretion.

PROSECUTORIAL DISCRETION

To say that the prosecutor has no discretion in determining the charge to be filed would be inaccurate, because admittedly he does. No system has yet been devised, if indeed such a system is possible, to ensure that the prosecutor uses correct judgment in the selection of the charge to be filed. However, this is not to say that the prosecutor has unlimited discretion. Petitioner recognizes that once a charge is filed, any action relating to the disposition thereof requires court approval.⁷ Oklahoma procedure also requires the examining magistrate at a preliminary hearing to direct the accused to be held for trial on a charge which the evidence reflects, not necessarily the crime charged.⁸

7. Petitioner's brief, page 22.

8. 22 O.S. 1971, §264, provides:

"Defendant held to answer.

"If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner indorse on the complaint an order signed by him to the following effect:

"It appearing to me that the offense named in the within complaint mentioned (or any other offenses, according to the fact, stating generally nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof. I order that he be held

Further, in response to Furman, the Oklahoma Court of Criminal Appeals has held that once the accused has been arraigned for a capital offense, the State cannot simply enter into a plea bargain agreement. The State must establish by competent evidence that the accused committed the lesser offense and is not guilty of Murder in the First Degree as a predicate for the District Court to approve a reduction of the charge. State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975).

JURY DISCRETION

Oklahoma requires assessment of the death penalty upon the conviction of Murder in the First Degree, 21 O.S. Supp. 1974, §701.3. Petitioner stresses that Oklahoma procedure also provides for instructing the jury regarding a lesser included offense,⁹ but only where warranted by the evidence. Surely petitioner does not suggest such instruction should not be given irrespective of the evidence, for such procedure most certainly would be fundamentally unfair to any accused. Petitioner's argument in this regard inherently calls for condemnation of jury determination in capital cases and necessarily presents a separate and distinct approach regarding the constitutionality of the death penalty itself. If this Court should adopt petitioner's concept, then our present system of criminal jurisprudence must necessarily be dismantled, for the traditional role of a juror to judge the credibility of witnesses, weigh the evidence and be a trier of fact, is inextricably woven into our system of justice.

A lesser included instruction was given in the instant case because it was warranted by the evidence. Conversely, such instruction was not given in, e.g., Williams and Justus

9. Petitioner's brief, pages 29-36.

v. State, *supra*. In this connection, petitioner's contention presents a mild irony. Williams, Justus and petitioner are white, while William Provo, a black,¹⁰ will be given a new trial because the trial court committed fundamental error by failing to instruct the jury on Manslaughter in the First Degree under the evidence adduced.¹¹

Delaware is the only jurisdiction respondent notes to seemingly accept the view that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense, State v. Sheppard, Del. Sup., 331 A.2d 142 (1975) citing dictum from State v. Dickerson, Del. Sup., 293 A.2d 761, 769-770 (1972). Other jurisdictions do not accept this view, e.g., State v. Selman, La., 300 So.2d 467 (1974); State v. Dixon, Fla., 283 So.2d 1 (1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975).

EXECUTIVE CLEMENCY

Oklahoma has held the possibility of executive clemency under Article VI, §10 of the Oklahoma Constitution not to be repugnant to either the State or Federal Constitutions, Williams and Justus v. State, *supra*.

In the post-Furman case of Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), this Court recognized that the very essence of the pardoning power is to treat each case individually and that individual acts of clemency inherently call for discriminating choices, because no two cases are the same.

10. Petitioner's brief, page 1b.

11. Provo v. State, Okl. Cr., ___ P.2d ___, appellate No. F-75-301, issued April 20, 1976.

CONCLUSION

Therefore, premises considered, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

Marvin C Emerson
MARVIN C. EMERSON
FIRST ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, Oklahoma 73105

COUNSEL FOR RESPONDENT

Of Counsel:

Bill J. Bruce
Assistant Attorney General

CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record, this 23rd day of April, 1976:

Donald Anderson
Office of the Public Defender
Oklahoma County Courthouse
Oklahoma City, Oklahoma 73102

Jack Greenberg, James M. Nabrit, III,
Peggy C. Davis, and David E. Kendall
10 Columbus Circle
New York, New York 10019

Anthony G. Amsterdam
Stanford University Law School
Stanford, California 94305

Marvin C Emerson
Marvin C. Emerson